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No. [redacted] 53

In the Supreme Court of the United States

OCTOBER TERM, 1964

WAYNE TURNER,

Appellant,

v.

LOUISIANA,

Appellee.

Appeal from the Supreme Court of the State of Louisiana

ORIGINAL BRIEF ON THE MERITS ON BEHALF OF LOUISIANA APPELLEE

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SUBJECT INDEX

	PAGE
Table of Cases Cited	i
Opinion of Lower Courts	1
Basis of Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Issues Presented for Review	5
Statement of the Case	6
Argument	7
State Law	7
Constitutional Question	
Conclusion	13
Certificate	15

TABLE OF CASES AND STATUTES CITED

United States Supreme Court Cases Cited:

Mattox v. United States, 146 U.S. 140, 13 S. Ct. 50, 36 L.Ed. 917 (1892) 12

Lower Federal Court Cases Cited:

Little v. United States, 73 F. 2d 861 (10th Cir. 1934) 11

Sutherland v. United States, 19F. 2d 202 (8th Cir. 1927) 12

United States v. Marine, 84 F. Supp. 785 (Del. 1949) .....

Louisiana Cases Cited:

State v. Hornsby, 8 Rob. 554 (1844) 12

State v. Oteri, 128 La. 939, 55 So. 582 (1911) 12

PAGE

State v. McAllister, 244 La. 42, 150 So. 2d 557 (1963) 11, 13
State v. Migues, 191 La. 55, 184 So. 540 9
State v. Sharbino, 194 La. 709, 194 So. 756 9
State v. Fuller, 218 La. 872, 51 So. 2d 305 9
State v. Davis, 237 La. 577, 111 So. 2d 778 9

Cases from other States cited:

State v. Woods, 233 Ind. 320, 119 NE 2d 558 (1954) .....

Statutes cited:

Louisiana Revised Statutes 15:394 ..... 5, 9, 13
West's Louisiana Statutes Annotated, R.S. 15:394 4
West's Louisiana Statutes Annotated, R.S. 15:432 5
American Jurisprudence, Section 858, Volume 53 9
American Jurisprudence, Section 861, Volume 53 10
American Jurisprudence, Section 862, Volume 53 10
American Jurisprudence, Section 876, Volume 53 10

No. 943

In the Supreme Court of the United States

OCTOBER TERM, 1964

WAYNE TURNER,

Appellant,

v.

LOUISIANA,

Appellee.

ORIGINAL BRIEF ON THE MERITS ON BEHALF OF LOUISIANA APPELLEE

OPINION OF LOWER COURTS

The opinion of the Supreme Court of the State of Louisiana is reported at:

244 La. 447 (official) and at
152 So. 2d 555 (unofficial)

BASIS OF JURISDICTION

Appellant is before this Court pursuant to an order of this Court dated March 23, 1964, dismissing the appeal and granting a writ of certiorari, which said order is fully reproduced at page sixty-eight (68) of the "Transcript of Record" filed herein.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following provisions of the Constitution of the United States:

(1) "No person shall be held to answer for a

capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." United States Constitution, Amendment V.

(2) "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." United States Constitution, Amendment VI.

(3) "All persona born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, Amendment XIV, S 1.

This case involves the following provision of the Constitution of the State of Louisiana:

(1) "In all criminal prosecutions the accused shall have the right to a speedy, public and impartial trial in accordance with the provisions of this constitution. All trials shall take place in the parish in which the offense was committed unless the venue be changed; except that the Legislature may provide for the venue and prosecution of offenses when one of the acts constituting an offense or an element of the offense occurs in a parish of this state and other acts or elements thereof occur out of the parish or state, or when an offense is committed in this state but the exact place of the commission of the offense in this state cannot be established. The Legislature may provide for the venue and prosecution of offenses committed within 100 feet of the boundary line of a parish. The accused in every instance shall have the right to be confronted with the witnesses against him; he shall have the right to defend himself, to have the assistance of counsel, and to have compulsory process for obtaining witnesses in his favor. Prosecution shall be by indictment or information; but the Legislature may provide for the prosecution of misdemeanors on affidavits; provided, that no person shall be held to answer for capital crime, unless on a presentment or indictment by a grand jury, except in cases arising in the

militia when in actual service in time of war or public danger. No person shall be twice put in jeopardy of life or liberty for the same offense, except in his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained." Louisiana Constitution, Article I, § 9.

This case involves the following statutory provision of the State of Louisiana:

(1) "From the moment of the acceptance of any juror until the rendition of verdict or the entry of a mistrial, as the case may be, the jurors shall be kept together under the charge of an officer in such a way as to be secluded from all outside communication; provided that in cases not capital the judge may, in his discretion, permit the jurors to separate at any time before the actual delivery of his charge." West's Louisiana Statutes Annotated, R.S. 15:394.

(2) "A legal presumption relieves him in whose favor it exists from the necessity of any proof; but may none the less be destroyed by rebutting evidence; such is the presumption attaching to the regularity of judicial proceedings; that the grand jury was legally constituted; that public officers have done their duty; that a relation or subjectmatter once established, continues, but not that it pre-existed; that the defendant intended the natural and probable consequence of his act; that the defendant is innocent; that the defendant is sane and responsible for his actions; that the person in the unexplained possession of property recently stolen is the

thief; that evidence under the control of a party and not produced by him was not produced because it would not have aided him; that the witnesses have told the truth." LSA R.S. 15:432.

ISSUED PRESENTED FOR REVIEW

The accused urges that his conviction was obtained from a jury which had been handled in such a way as to violate the civil rights of the accused, and in particular the right of an accused to a trial by a fair and impartial petit jury.

In the opinion of counsel for the State, the issues presented to this Court for review may be stated as follows:

(1) Does a separation of one or more jurors from the remainder of the jurors constitute a "Separation" as contemplated by LSA R.S. 15:394 and the Constitution of the United States and of Louisiana, if each group of jurors is under direct custody and supervision of a deputy sheriff or bailiff?

(2) Does the presence of a deputy sheriff or bailiff who is also a State witness with one or more jurors, on an occasion of transporting jurors to and from meals and lodging, or ministering to their needs, constitute a violation of the defendant's civil rights and his constitutional rights to a degree which would vitiate a jury verdict of guilty? in a capital case?

(3) Does contact between one or more jurors with such deputies or bailiffs constitute an irrebuttable presumption of misconduct or prejudice?

STATEMENT OF THE CASE

Wayne Turner was tried under a Grand Jury indictment for the murder of Albert Young on October 7, 1960.

On October 6, 1960, Wayne Turner arrived in Hammond, Tangipahoa Parish, Louisiana, accompanied by his wife, Shirley Turner. They had rented a car in California for the trip. They rode around the Hammond area until 1:00 A.M. of the morning of October 7, looking for a place to burglarize, and finally chose a Phillips "66" service station located on Highway 190 just beyond the city limits of Hammond, on the west.

They returned to the business area of Hammond, where Wayne Turner broke into the Community Chevrolet Co., Inc. and stole a 1960 Galaxie Ford. It was arranged that Wayne was to go to the station in the Ford and Shirley was to pick him up after the burglary, in the car which they had rented. The Ford was to be abandoned on the scene to make pursuit and identification more difficult.

When Turner drove up in the drive-way of the service station, Albert Young, the attendant approached him and asked him what he wanted. Turner informed him that it was stick up.

As Turner got out of the car, Young pulled a gun from his pocket, and Turner who had by this time pulled out his gun, fired three times, hitting Young in the chest, before Young could fire.

One of the bullets passed through Young's heart, killing him almost instantly.

Turner fled to a nearby woody area, threw away the gun clip and identification papers and other papers, and as per plan, was picked up by Shirley.

They were later apprehended in a ditch into which they ran while trying to turn around.

Turner was tried individually and found guilty as charged.

A number of bills of exception were taken but only one bill was perfected.

It is noted that the brief of Appellant dispels any doubt that Albert Young died at the hand of Wayne Turner. Doubt does exist in the mind of the State however, that no one would have died at all but for the foolhardy armed resistance by Young.

The jury returned a verdict of guilty as charged which carried with it the mandatory death sentence. The Louisiana Supreme Court heard the appeal and refused to grant a new trial.

The case is now before this court for review on a writ of certiorari.

ARGUMENT

May it please the Court:

State Law:

Objections to the admissibility of the testimony of Deputies Simmons and Rispone during the trial, the motion for the mistrial, and the motion for a new

trial were based on the fact that these two deputies were the chief witnesses for the State and from the commencement of the trial, they had pursuant to their duties, served jury summons; taken the petit jury into custody during the trial, attending to their wants and acting as a guard to keep the jury members separate from any outsiders.

Attorneys for the defendant, Wayne Turner allege further that these deputies associated with the petit jury on a very close basis, sleeping, eating, and associating with the jury members during the course of the trial; that on one occasion they allowed one of the jury members, Mr. Casanova, to be isolated from the other members of the jury; and further, that they ran errands and made telephone calls for them and *mingled* with and became a part of and identified as a member of the group all during the trial.

There is nothing in the record to show that these deputies or any other deputies or any other persons ever entered the jury room while any deliberations were going on or arguments made. There is nothing in the record to show that these deputies or any other deputies in charge of the jury members at any time discussed with any one or more of said jury members any fact about the case or in any manner attempted to influence them nor in any manner performed their official duty in such a manner as to attempt to create an obligation on the part of the jury member to favor (?) the side of the State in this case.

The State does not deny that the testimony of

both of these deputies was essential as was any other major link in the testimony of the trial.

Counsel for the defense assume first that there was a separation of the jurors. They also contend that the exposure of the person of the two deputies to the persons of the jury members automatically raises the presumption of fraud and deceit, which automatically vitiates the judgment and the verdict and the sentence.

Louisiana Revised Statutes 15:394 provides:

> "From the moment of acceptance of any juror until the rendition of the verdict or the entry of a mistrial, as the case may be, the jurors shall be kept under the charge of an officer in such a way as to be secluded from all outside communication."

The purpose of this section is to keep the jurors from any *outside* influence. The separation contemplated is separation from the public or outside contact.

State v. Migues, 191 La. 55, 184 So. 540
State v. Sharbino, 194 La. 709 194 So. 756
State v. Fuller, 218 La. 872 51 So. 2nd 305
State v. Davis, 237 La. 577, 111 So. 2nd 778

It of course follows that in the discharge of his duty the officer shall not have any influence on the jury, shall not discuss the case with the jury or attempt to discuss it with them or attempt to influence the verdict in any manner.

Section 858, American Jurisprudence, Volume 53, declares:

"An officer who is prejudiced with respect to a

case on trial is not necessarily disqualified from acting as custodian of the jury, nor merely because he happens to be a witness for the prosecution."

This declaration goes to greater length than the present case, in that no prejudice on the part of any deputy was shown.

Section 861, same Volume, declares:

The word "separation" as applied to jurors and juries is used both in the sense of a separation of one or more jurors from their fellows, and in the sense of a dispersal of the jury itself, so that they may go to their several homes or about their businesses.

Section 862 declares:

The prominent object of the rules respecting the seclusion of juries is to secure them from improper influences; to keep the jury aloof and free from contact or communication with other parties THAN THE BAILIFFS who have them in keeping during the trial.

Section 876 provides:

Not every separation of a juror from his fellows constitutes an unlawful separation, or is such a separation as the law will notice.

The sole separation complained of by the defendant arose when one of the jurors, Paul Casanova, was separated from the other eleven jurors, at Ardillos restaurant, where the jury went to eat its noon meal. The meal finished, Deputy Hulon Simmons went to

pay the check for the meal. After paying the check he discovered that the juror, Casanova, had been left by the other two deputies driving the other eleven jurors in two cars. He was however left in the custody of Deputy Vincent Rispone and never left his care.

On the motion for the mistrial (Page 27, Transcript) the Court suggested that in view of Mr. Pierson's motion, that if there is any information that should be elicited from Deputy Rispone, that he be cross-examined by Mr. Pierson, which was done. The testimony on Pages 28 and 29 disclose under cross-examination by defense counsel Pierson that nothing transpired between the deputy and the juror which would have in any manner created a presumption of misconduct.

The cases cited before together with the case of *State v. McAllister*, 244 La. 42, 150 So. 2d 557 (1963), represent the Louisiana viewpoint with regard to the definition of separation and the legal effect of the communication between deputies who are also State witnesses.

The case of *Little v. The United States*, 73 F. 2d 861 (10th Cir. 1934), cited by the defense appears to disclose the Federal view with regard to the effect of a communication between jurors and third persons or officers in charge of a jury.

> "Private communications, possibly prejudicial, between jurors and third persons or witnesses, or the officer in charge are absolutely forbidden, and invalidate the verdict, at least *unless* their harmlessness is made to appear."

This view is further sustained by the case of *Sutherland v. United States*, 19 F. 2d 202 (8th Cir. 1927) wherein the issue concerned a witness conversing at length about some feature of the case with one juror.

> "The rebuttable presumption was that these communications by the juror *with outside* persons were prejudicial. There is no evidence in the case that the presumption was rebutted."

In the case of *Mattox v. United States*, 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917 (1892), the bailiff in charge of the jury discussed the case with the jurors in his charge.

There is no difficulty in these cases to see why reversals were had.

In the case at Bar the facts are different and any presumption which may have arisen as to misconduct were rebutted by direct testimony from the parties involved.

Passing to the State cases cited by defense counsel in support of their position, it appears that there are really none which are on all fours with the instant case.

In the case of *State v. Hornsby*, 8 Rob. 554 (1844), the jury was allowed to separate by the court. In our instant case, no separation actually occurred.

In *State v. Oteri*, 128 La. 939, 55 So. 582 (1911), a barber was allowed to serve the jury and in the case presented a factual situation where an outsider ac-

tually came in and mingled with the jury. However, the Court held that a presumption of misconduct does not arise where jurors have been kept together.

In *State v. McAllister*, 244 La. 42, 150 So. 2d 557 (1963), the identical factual situation which occurred in the instant case was passed on by the Supreme Court of Louisiana and the judgment of the lower court was affirmed, maintaining that any presumption which may have arisen as to misconduct was sufficiently rebutted.

CONCLUSION

In view of the cases cited it appears that the issues presented for review should be resolved in the following manner:

(1) The separation contemplated by LSA R.S. 15:-394 of the State of Louisiana and the Constitution of Louisiana and the Constitution of the United States is a separation from public or outside contact. If the jurors in individual groups or collectively are under direct custody and supervision of a deputy sheriff or bailiff, even though they may be in different cars or eat at separate tables, there is no legal separation of the jurors.

(2) The presence of a deputy sheriff or bailiff who is also a State witness with one or more jurors on the occasion of transporting jurors to and from meals and lodging or administering to their needs does not constitute a violation of the defendant's civil rights or his constitutional rights to a degree which would vitiate a jury verdict of guilty in a capital case.

(3) The contact between one or more jurors with such deputies or bailiffs constitutes a presumption of misconduct or prejudice which can and was rebutted.

(4) The defendant had a legal trial by an impartial jury and all of the rights guaranteed to him under the laws of the State of Louisiana and of the United States and their respective constitutions were properly safeguarded. The judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE

I, Michael E. Culligan, a member of the Bar of the United States Supreme Court, hereby certify that this____ day of_____, 1964, a copy of the above and foregoing brief was served on Burrell J. Carter, Greensburg, Louisiana, Henry A. Mentz, Jr., 406 West Thomas Street, Hammond, Louisiana and Allen B. Pierson, Jr., 103 North Sixth Street, Ponchatoula, Louisiana, by depositing same in the United States Mail, postage prepaid.

_____

Of Counsel.